United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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To be argued by:
PAUL F. CORCORAN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1173

UNITED STATES OF AMERICA,

Appellee,

—against—

JAIME CASTRO-TIRADO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
PAUL CORCORAN,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Jaime Castro-Tirado appeals from a judgment of the United States District Court for the Eastern District of New York (Bartels, *J.*), entered on March 26, 1976, convicting him, upon his plea of guilty, of one count of possession of cocaine with the intent to distribute in violation of Title 21, United States Code, Section 841(a)(1). Appellant was sentenced to four and a half years imprisonment and a special parole term of three years; he is presently incarcerated pursuant to said sentence.

With the permission of the Court, appellant, who plead guilty after a suppression hearing, was permitted to reserve his right to appeal the District Court's decision denying his motion to suppress a kilogram of cocaine seized from his suitcase at an Immigration and Naturalization Service detention center search conducted approx-

imately two hours after an an administrative arrest that appellant concedes was lawful. Accordingly, the sole issue on appeal concerns the constitutionality of the search of said suitcase.

Statement of Facts

Appellant was lawfully arrested as he disembarked a domestic flight, originating in Los Angeles, California and landing at John F. Kennedy International Airport on October 23, 1975. Criminal Investigator Thomas Flood of the Immigration and Naturalization Service (hereafter INS) testified at the suppression hearing that he and Investigator Larry Mulkearns were assigned to John F. Kennedy International Airport for the purpose of observing flights arriving from Los Angeles, which were known to carry an unusually high number illegal aliens. Agent Flood noted that he himself had arrested approximately 300 illegal aliens arriving on Los Angeles flights in the nine months preceding the appellant's arrest (13).[1] While observing the arrival of one such flight, Flood observed the appellant walking and conversing with one who was later identified as Nietro Ramos as they deplaned. Based upon "reasonable suspicion" arising from the demeanor of the two men as they entered the terminal from the Los Angeles flight, their Hispanic appearance, and the fact that they were overheard speaking in Spanish, agent Flood approached and asked if they spoke English. (18) When they both responded negatively, agents Flood and Mulkearns separated the two men and questioned them as to alienage and deportability. The appellant admitted he was an alien from Columbia. (19) He claimed to be legally in this country, but was unable to produce either a passport or an I-94 Alien Regis-

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[1] Parenthetical page references refer to the suppression hearing transcript.

tration form.[2] Flood then placed the appellant under arrest as an illegal alien. (Title 18, United States Code, Section 1357). The appellant concedes that his arrest was lawful.

After the arrest, Mulkearns searched Castro and found his airline ticket. Attached to the flight folder were two baggage claim tickets, one for a flight to Phoenix, Arizona and one for a flight to New York. When the appellant was asked if he had any luggage, he answered "No." (49) Agents Flood and Mulkearns then took the appellant and Nietro Ramos, who had also been arested as an illegal alien, to the baggage carousel where they retrieved a suitcase bearing a baggage claim check corresponding to the one attached to the appellant's ticket. An identification tag bearing the appellant's name was also attached to the suitcase.

The appellant was then taken to INS headquarters for processing. En route, the appellant admitted that he had previously been deported from the United States and, while claiming to be present on a tourist visa, he admitted that he had not obtained requisite permission of the Attorney General before re-entry.[3]

Upon arrival at INS headquarters, the appellant was processed and was to be lodged at the INS detention facility at the Brooklyn Navy Yard pending a deportation

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[2] Title 8, United States Code, Section 1304(e), requires all aliens over 18 years of age to carry on their persons at all times "any certificate of alien registration or alien registration receipt card." The I-94 form which defendant claimed to have but could not produce is one such required form. See Title 8, C.F.R. Section 264.1; *United States* v. *Abrams*, 427 F.2d 86, 91 (2d Cir. 1970).

[3] Title 8, United States Code, Section 1326 makes it a felony for a deported alien to enter the United States without first obtaining permission from the Attorney General.

hearing.[4] Agent Mulkearns testified that INS procedure required a search of all personal belongings accompanying the detainee to the detention facility in order to discover and remove any dangerous weapon, or other means of escape or injury. (127) Mulkearns explained that detained aliens are allowed access to their belongings at the detention facility (107). Accordingly, Castro was asked to open the locked suitcase, which he did. An examination of the suitcase revealed the kilogram of cocaine which was the basis for the appellant's indictment and conviction for possession, with intent to distribute, cocaine in violation of Title 21, United States Code, Section (841(a)(1).

ARGUMENT

The District Court Properly Denied Appellant's Motion To Suppress.

Conceding that he had been lawfully arrested as an illegal alien, appellant contends that his Fourth Amendment rights were violated when two hours after his administrative arrest, and upon arrival at INS headquarters, appellant's accompanying luggage was subjected to a warrantless inventory search. Appellant's claim is wholly without merit.

As the United States Supreme Court recently reiterated in *United States* v. *Edwards*, 415 U.S. 800, 802 (1974), the Fourth Amendment's warrant requirement is subject to various exceptions, one of which permits

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[4] While appellant's passport and I-94 were subsequently produced by his family about two hours after the search in question, earlier production would not have changed procedure. Since appellant admitted entering the country in violation of Section 1326, his I-94 would have been void *ab initio*.

warrantless searches incident to custodial arrests. *See also United States* v. *Robinson*, 414 U.S. 218 (1973); *Chimel* v. *California*, 395 U.S. 752, 755 (1969); *Weeks* v. *United States*, 232 U.S. 383, 392 (1914). This exception is "justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained." *United States* v. *Edwards*, *supra*, 800 U.S. at 802-803. Essentially, the *Edwards* opinion noted, quoting *United States* v. *DeLeo*, 422 F.2d 482, 493 (1st Cir. 1970), a legal arrest does, for "at least a reasonable time and to a reasonable extent", take the arrestee's privacy "out of the realm of protection from police interest in weapons, means of escape and evidence." *Id.* at 808-809.

Thus, when a person is lawfully arrested, the arresting officers have a right to conduct a search of the arrestee's person as well as items within his immediate control. *United States* v. *Robinson*, *supra*; *Chimel* v. *California*, *supra*; *Evalt* v. *United States*, 382 F.2d 424 (9th Cir. 1967); *People* v. *Mancusi*, 301 F. Supp. 110 (S.D.N.Y. 1967); *United States* v. *Lam Muk Chin*, — F.2d — (2d Cir. Slip Op. 1177; decided August 15, 1975); *United States* v. *Edmonds*, — F.2d — (2d Cir. Slip Op. 562; decided May 7, 1976). Such a search may be conducted either immediately upon arrest or may be deferred until arrival at the detention site. *Cardwell* v. *Lewis*, 417 U.S. 583 (1974); *United States* v. *Edwards*, *supra*; *United States* v. *Edmonds*, *supra*; *People* v. *Mancusi*, *supra*; *United States* v. *Caruso*, 358 F.2d 184 (2d Cir.), *cert. denied*, 385 U.S. 862 (1966).

In *United States* v. *Edmonds*, *supra*, this Court was presented with a similar factual situation. There, the defendant, an illegal alien, was arrested and taken to police headquarters. The suitcase he had been carrying at the time of his arrest was then searched. This court

upheld the search as incident to a custodial arrest, stating that where effects in possession of a person lawfully arrested were subject to search at the time and place of arrest, they may be searched without a warrant "even after a substantial time lapse following the arrest." Slip Op. No. 562 at p. 3562.

Moreover, an arresting officer has a right as well as a duty to inventory property taken from an accused at the time of arrest. *See United States* v. *Grill*, 484 F.2d 990 (5th Cir. 1973); *United States* v. *Lipscomb*, 435 F.2d 795 (5th Cir.), *cert. denied*, 401 U.S. 980 (1970). *See also Harris* v. *United States*, 390 U.S. 234 (1968); *Cooper* v. *California*, 386 U.S. 58 (1967); *United States* v. *Davis*, 496 F.2d 1026 (5th Cir. 1974); *United States* v. *Ducker*, 491 F.2d 1192 (5th Cir. 1974); *People* v. *Sullivan*, 29 N.Y. 2d 69. *United States* v. *Grill*, *supra*, is particularly analogous to the instant case. In *Grill*, the defendant was arrested as he was about to board a commercial plane for a flight from Florida to New York. At the time of his arrest, his baggage, which was already aboard the plane, was removed and taken to the United States Custom's office. Eight days after Grill's arrest, the Internal Revenue Service filed a lien against his property. Prior to placing the suitcase in a bonded warehouse pending the outcome of the litigation, an Internal Revenue Service agent opened the suitcase and examined its contents. The search was predicated on two grounds: "to make an inventory of the contents, and to see if it contained explosive devices or other materials that might pose a danger to the warehouse or other stored items." Evidence of criminal activity was discovered and subsequently introduced in a criminal proceeding. In upholding the search of the suitcase as reasonable, the Fifth Circuit Court relied on the obvious need to protect both persons and property from the dangers posed by the unknown contents of the suitcase.

See also United States v. *Lipscomb*, *supra*, at 800, where, in upholding an inventory search, the court noted:

> "The Fourth Amendment does not forbid all searches and seizures but only those that are unreasonable. Whether a particular search is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of the case. We hold that in the circumstances of this case the actions of the Montgomery police in inventorying Lipscombs' personal belongings without a warrant did not constitute an unreasonable search. It can not be denied that to prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in his possession. An inventory is then necessary both to preserve the property of the accused . . . and to forestall the possibility that the accused may later claim that some item has not been returned to him."

In the instant case, INS faced similar problems as those involved in *Grill*. Castro's suitcase, while not in his immediate control at the time of his arrest, was in the custody of the INS shortly thereafter. As indicated by agent Mulkearns, the suitcase, as the personal property of the defendant, would accompany him to the detention center where it would be stored pending the defendant's deportation. Furthermore, as is INS procedure, the detainee would have had access to his suitcase and the contents thereof during the period of detention. The dangers posed by the unknown contents are obvious. The suitcase might well have contained a weapon, explosive devises, or other means by which the defendant might have escaped from the detention facility, or caused injury to himself or others. Consequently, action by the INS

agents in examining the contents of Castro's suitcase was reasonable and proper.[5]

Finally, in denying at the airport that he had any baggage with him, the appellant may be found to have abandoned the suitcase in which the cocaine was subsequently found. Retrospective analysis clearly evidences the appellant's intention at the time of his arrest to dissociate himself from the incriminating baggage (49). Such abandonment effectively deprives the appellant standing to raise Fourth Amendment claims with regard to the opening of the suitcase. See *United States* v. *Abel*, 362 U.S. 216 (1960); *United States* v. *Coll*, 357 F. Supp. 333 (D. Ct. Puerto Rico, 1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Eastern District of New York.

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[5] Agent Mulkearns testified that when he searched appellant's suitcase he had no reason to believe it contained contraband. Consequently there existed neither need nor basis to obtain a criminal search warrant prior to opening the suitcase.

* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Sara Posner in the preparation of this brief. Ms. Posner is a third year law student at the Western New England College of Law.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 6th day of July, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Evseroff & Sonenshine, Esqs.
186 Joralemon Street
Brooklyn, NewYork 11201

Sworn to before me this
6th day of July, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON